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THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

vs.

ATTORNEY GENERAL ET AL

STATEMENT OF THE BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW ON APPEAL.

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the appellant files this, its statement of the basis upon which it claims that the Supreme Court of the United States has jurisdiction to review the judgment of this Court.

(1) The statutory provision which sustains the jurisdiction of the Supreme Court of the United States, is Section 237 of the Judicial Code, also known as U. S. C., Title 28, Section 344.

(2) The statute of the State of New Hampshire the validity of which is involved is known as "An Act Relating to Political Advertising" and is Chapter 185 of the Session Laws of 1945 found at page 264 of the publication

"New Hampshire Public Acts and Joint Resolutions of the Legislature of 1945 and Special Session of 1944."

The said Chapter 185 amends Chapter 42 of the Revised Laws of the State of New Hampshire by providing as follows:

"1. Political Advertising. Amend section 6, chapter 42 of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published, in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type "Political Advertisement." No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates, or in any way knowingly aids, or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for com-

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mercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage.

(Approved May 18, 1945.)"

(3) The judgment sought to be reviewed is dated September 3, 1946, being a decision denying a petition for a rehearing of a judgment previously entered on June 27, 1946; and the date upon which the application for appeal from the judgment of September 3, 1946, was presented is the Fourth day of November, 1946.

(4) The case, the raising of Federal questions, and the rulings herein were of a nature hereinafter set forth, being such as to bring the case within the jurisdictional requirements hereinbefore set forth:

(a) The appellant filed in the April, 1946, Term of the Superior Court of Rockingham County, State of New Hampshire a Petition for Declaratory Judgment to determine its rights under Chapter 185, Session Laws of 1945. In paragraph 18 thereof (pages 5 and 6) it was requested:

"(18) That in the alternative and/or in the event that the court should determine and adjudicate that

said Petitioner is not entitled to charge its published political rate and that the charging and receiving of same for political advertising is in violation of the provisions of Section 2 of said Chapter 185, said Petitioner respectfully requests said court to render a declaratory judgment, adjudging and decreeing:

(a) That Section 2 of Chapter 185 of the Session Laws of 1945 is unconstitutional and void because:

(1) It impairs the Petitioner's right of freedom of contract;

(2) It does not state or set forth an ascertainable standard of guilt with such explicit definition that the law abiding may avoid prosecution and final protection;

(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;

(5) That commercial advertising does not carry with it the risk of libel that a political advertisement does;

(6) That the risk involved in the publication of ordinary commercial advertising is much less than that involved in political advertising;

(7) That said section wholly supplants the right of private contract relating to the rates to be charged for political advertisements;

(8) That a consideration of the public health, safety, morals or general welfare does not authorize the Legislature, under the guise of exercising the police power, to deprive parties of the right to voluntarily contract concerning such ordinary and everyday affairs of life as the printing of political advertisements;

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(9) That said Chapter 185 deprives the Petitioner of its property without due process of law;

(10) That the Petitioner as the owner and publisher of a newspaper is not in the same classification or category as a public utility and is therefore not subject to governmental control and supervision as to the reasonableness of its advertising rates;

(11) That the statute is unreasonable, regulatory and discriminatory in that it attempts to impose restrictions on publishers of newspapers or other periodicals or operators of radio stations, and does not regulate or attempt to regulate various and numerous other forms and methods of political advertising, thus creating a privilege for such other advertisers and penalizing publishers of newspapers and radio stations.

(12) That it is an unwarranted, unjustifiable, illegal and unconstitutional attempt to limit the circulation of information to which the public is entitled."

(b) The questions of law raised by the appellant's petition were reserved and transferred to the Supreme Court of New Hampshire without ruling on May 8, 1946, by Stephen N. Wheeler, Presiding Justice of the said Superior Court of Rockingham County, State of New Hampshire (see: Reserved Case —— —— p. 1).

(c) The Supreme Court of the State of New Hampshire rendered a decision on June 27, 1946, declaring Ch. 185 of the Session Laws of New Hampshire to be constitutional. The decision and opinion (a copy of which is annexed hereto) is not yet officially reported but can be found in 48 A(2) 478. In its opinion the Court dealt specifically with the following questions: whether the statute in question was arbitrary and lacked a rational basis in establishing maximum rates (48 A(2) 478, 480), whether it was an invalid encroachment on the freedom of contract (48 A(2) 478, 48112), whether it abridged the liberty of the press (48 A(2) 478, 481), and whether it was discriminatory

and denied the equal protection of the laws (48 A(2) 478, 481). After considering these questions the Court found the statute constitutional.

(d) In the September Term, 1946, of the Supreme Court of the State of New Hampshire, the appellant filed in the said Court a Motion for Rehearing with a Brief in support thereof again attacking the constitutionality of Chapter 185 of the Session Laws of 1945, under the Fourteenth Amendment to the Constitution of the United States.

(e) On September 3, 1946, the Supreme Court of the State of New Hampshire denied the appellant's Motion for a Rehearing.

(f) In the October Term, 1946, of the Supreme Court of the State of New Hampshire the Honorable Thomas L. Marble, Chief Justice of the said Court, signed a certificate to the effect that by its original petition and its motion for a rehearing the appellant had raised Federal questions, attacking the constitutionality of the said Chapter 185, Session Laws of 1945 on the ground that it violated the freedom of the press, the freedom of contract, and that it deprived the appellant of its property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and the said certificate further stated that the Supreme Court of the State of New Hampshire, being the highest court in the said state in which a decision on the said Federal questions could be had, had considered the said questions on their merits and had decided that the said Statute was not repugnant to the 14th Amendment to the Constitution of the United States.

(5) The following decisions of this Court are believed to bring the case within the jurisdictional provisions relied on:

Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. *Bay*, 200 U. S. 179 (1906);

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Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933);

Senn v. *Tile Layers Protective Union, Local No. 5 et al.*, 301 U. S. 468 (1937);

Lovell v. *City of Griffin, Ga.*, 303 U. S. 444 (1938);

Market St. Ry. Co. v. *Railroad Commission of State of California et al.*, 324 U. S. 548 (1945).

(6) The Federal questions raised by the appellant as hereinbefore described are substantial on the following grounds:

(a) Chapter 185 of the Session Laws of 1945 obviously attempts to control the price which may be charged by newspapers for political advertising. It was upheld by the Supreme Court of New Hampshire which sustained its position by merely citing *Nebbia* v. *New York*, 291 U. S. 502 (1934), and *Olsen* v. *State of Nebraska*, 313 U. S. 236 (1941) to prove that price control is not necessarily an invalid governmental interference with contract and property rights merely because it is imposed on a business outside of that class which was traditionally described as businesses "affected with a public interest." The Court ignored, however, the criteria set up for price control legislation in the *Nebbia* case: "the law shall not be unreasonable, arbitrary, or capricious," and "the means selected shall have a real and substantial relation to the object sought to be attained" (291 U. S. 502, 525-6).

It is the appellant's contention that the application of these tests to the Statute in question proves its unconstitutionality. The objective of the legislation purports to be the fostering of fair and equal elections. But there is no obvious relation between the price charged for political advertising and the announced objective. There is no conceivable reasonable basis for asserting that the rate set

for political advertising affects the right to cast a vote or the manner in which votes are cast. No relation between the statute and the announced objection is spelled out by the Supreme Court of New Hampshire. In the absence of a reasonable relationship between the statute and the general objective, the legislation is void under the first test laid down by the *Nebbia* case.

The second test suggested by that decision is that the Act in question be free from arbitrariness and capriciousness. Whether the maximum rate is set capriciously and arbitrarily is difficult to determine without knowing the supposed relationship between the Act and the alleged objective. However, the maximum rate should be set in a manner which at least tends to leave a fair return to the business whose property and contracts are being regulated. The statutory scheme in question for drawing the line between exorbitant and non-exorbitant charges or between a fair and unfair return is obviously arbitrary. Connecting the price of political advertising for each newspaper to the commercial rate it charges neither tends to prevent exorbitance nor to guarantee a fair return. There is no reasonable foundation for assuming that rates charged for commercial advertising are not exorbitant or that they guarantee at least a fair return to publishers. To tie political rates to commercial rates is not a reasonable way to determine a political rate which is not excessive and which tends to assure the publisher of at least a fair return. Those publishers who, for some reason, are able to set exorbitant commercial rates are permitted also to set high political rates. Those who are unfortunate enough to receive less than a fair return on commercial advertising are burdened with the same disadvantage so far as political rates are concerned.

The arbitrary nature of the rate regulation is enhanced

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when one considers the fact that the cost factors entering into the fixing of prices for advertising are entirely different in political advertising than in commercial. The former type of advertising subjects the publisher to the risk of liability for defamation and criminal liability for failure to label the advertising as political. Political advertising is temporary and seasonal so to speak. Defaults in payments by political advertisers are understandably much higher than those by commercial advertisers. No counterbalancing considerations can be imagined or have been suggested which make commercial advertising more onerous than political. Because of the important price factors indicating that political advertising should bring a greater return than commercial, the relationship of the maximum rate which can be charged for it to that set voluntarily for commercial advertising is obviously an arbitrary and capricious method of price regulation.

In short, the Supreme Court of New Hampshire has relied strongly on the *Nebbia* and *Olsen* cases, but it has failed to apply the limiting tests set out in the *Nebbia* decision. The testing of the Act in question by those criteria presents substantial Federal questions. Because the *Nebbia* and *Olsen* cases have only in comparatively recent times created the possibility of price control in fields outside the traditional businesses affected with public interest there has been little opportunity for judicial application of the qualifying tests laid down therein. There has been no decisions clearly indicating an answer to the Federal questions raised herein concerning the regulating of the property and the contracts of the appellant.

(b) The appellant has raised the Federal question as to whether the Act in question violates the freedom of the press. The freedom is guaranteed the plaintiff under the Fourteenth Amendment. *Grosjean* v. *American Press Co.*,

Inc., 297 U. S. 233 (1936). It is the appellant's position that the Statute involved here is directed primarily at restricting the income of newspapers and hence is a violation of the liberty of the press. This argument the Supreme Court of New Hampshire has met by stating first that the freedom in question is not absolute. Admittedly true, this observation advances the argument only a trifle. That Court went on to state that newspapers enjoy no special immunity from the application of laws, citing *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 (1937) and *Associated Press et al.* v. *U. S.* 326 U. S. 1 (1945). This statement is full of qualifications. In *Associated Press* v. *N. L. R. B.* the most pertinent one was stated (301 U. S. 103, 133):

> "The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the writing and rewriting of news * * *"

Improper restrictions on the liberty to publish or to enforce a newspaper's policies with respect to news may be indirect as well as direct. Not all indirect regulation is innocuous. Obviously, since revenue is necessary to the very existence of a newspaper, a newspaper is peculiarly vulnerable at that point. Restrictions thereon should be scrutinized carefully. As was stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936) with respect to the restriction tested there:

> "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation."

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As this Court stated in that opinion with respect to taxing advertising (p. 245):

> "This (restraint) is plain enough when we consider that, if it were increased to a high degree, as it could be if valid, * * * it well might result in destroying * * * advertising * * *"

What is true, in this respect, of taxing advertising is also true of regulating the price charged for advertising. It is submitted, therefore, that the restraints imposed by the Statute in question are more serious and onerous than those involved in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 (1937), and *Associated Press et al.* v. *U. S.*, 326 U. S. 1 (1945), relied on by the Supreme Court of New Hampshire.

Another distinction overlooked by that Court in its reliance on those decisions is that they involved regulations applicable to all businesses. The Act under discussion singles out newspapers and radios for its imposition of price control. Obviously the danger to a free press is greater in a statute directed specifically at it alone than one directed at all businesses.

It is submitted that the price regulation inherent in the act involved here, entails a substantial restraint on the freedom of the press and is especially dangerous since it applies only to newspapers and radios. Furthermore, the restraint on the press is imposed for an ill-defined purpose. Presumably, in some way, it is imposed for the purpose of obtaining fair and equal elections. The extent to which it fosters that purpose, if at all is so negligible that it is not worth the sacrifice made in terms of restraints on the press. The public welfare promoted by this encroachment does not have the significance of that involved in *Associated Press* v. *N. L. R. B.*, *supra* or *Associated Press et al.* v. *U. S.*, *supra*. Because the restraint is substantial, because it is directed only at newspapers and radios and because the

resulting good in terms of better elections is negligible, the plaintiff submits that the Act in question violates the liberty of the press guaranteed by the State and Federal constitutions.

(c) The Supreme Court of New Hampshire relied in its opinion on the doctrine which restricts judicial review of legislative police power action to cases where the Legislature had no conceivable rational basis for adopting the restriction. At least with respect to the claim that the Act violates the freedom of the press, the appellant contends that since *W. Virginia State Board of Education et al.* v. *Barnett et al.*, 319 U. S. 624 (1943), no such limitation exists.

(d) The Supreme Court of New Hampshire has decided that the legislation in question does not deny the appellant its right of the equal protection of the laws, stating that the Legislature is not bound to cover the whole field of possible abuses so long as it regulates the major portion of any given problem. Though this may be true, it is nevertheless necessary that the law cover all similarly situated without invidious discriminations against groups or types. *Skinner* v. *State of Oklahoma*, 316 U. S. 535 (1942).

There is no reasonable basis for assuming that the problem of excessive rates is peculiar to radio and newspaper political advertising and does not exist in advertising in transportation systems, billboards and by job printers, or in assuming that the amount of political advertising done by media other than newspapers and radios is nominal. Nor can it reasonably be assumed that newspapers and radios have for some reason a unique opportunity to demand excessive rates. To classify and discriminate on the basis of the form which the advertising takes is to draw artificial lines and to make invidious discriminations.

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The Supreme Court of New Hampshire relied on *Queenside Hills Realty Co., Inc.* v. *Saxl*, —— U. S. ——, 66 S. Ct. 850 (1946). But that case is clearly distinguishable since the appellant there objected on the ground that discrimination might result between existing subjects of regulation and similar property which might come into existence in the future. No present existing discrimination was indicated but merely the threat of a development of circumstances in the future under which discrimination might result. The objection here is made to a presently existing discrimination based on artificial lines drawn between various forms which political advertising takes.

(7) It is respectfully submitted that the Supreme Court of the United States has jurisdiction upon appeal to review the decision of the Supreme Court of New Hampshire in the above entitled cause under Section 237 of the Judicial Code, also known as U. S. C., Title 28, Section 344.

STANLEY M. BURNS,
ELISHA HANSON,
Counsel for Appellant.

APPENDIX

Rockingham, June 27, 1946.

No. 3598

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

v.

ATTORNEY GENERAL & a

PETITION, for a declaratory judgment (R. L., *c.* 370 *s.* 20), to determine the constitutionality and the applicability to the plaintiff of Laws, 1945, *c.* 185, "An act relating to political advertising," Section 2 of which provides: "No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged."

The plaintiff publishes the Portsmouth Herald in the City of Portsmouth and "is the publisher of the New Hampshire Gazette, established October 7, 1756, and the oldest newspaper in America." The defendants, other than the Attorney-General, are officials of the Portsmouth City Political Committees who inserted political advertisements in the plaintiff's paper. These defendants paid and the plaintiffs received for these advertisements at the rate of $3.00 per inch. The rates charged by the plaintiff for commercial advertising was $1.50 per inch, local rate, and $2.00 per inch, open rate. Laws, 1945, *c.* 185, *s.* 3, requires a schedule of rates "for commercial advertising" to be filed with the Secretary of State, and the plaintiff filed the three above mentioned rates as his schedule.

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The questions of law raised by the plaintiff's petition were reserved and transferred without ruling by the Court (*Wheeler*, J.).

Hughes & Burns (*Mr. Walter A. Calderwood* orally), for the plaintiff.

Ernest R. D'Amours, Attorney-General (by brief and orally), *pro se*. (*Gordon M. Tiffany*, Law Assistant, on the brief).

Ralph G. McCarthy, for defendant Durell, filed no brief.

Certain other defendants, *pro se*, filed no briefs.

KENISON, J. A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein. *Tirrell* v. *Johnston*, 86 N. H. 530; *Woolf* v. *Fuller*, 87 N. H. 64; Anderson, Declaratory Judgments (Supp. 1946) 260.

The Constitution of New Hampshire guarantees that the right to elect and be elected shall be free and equal. "All elections ought to be free, and every inhabitant of the State, having the proper qualifications, has equal right to elect, and be elected, into office. * * *" Bill of Rights, Art. 11th. Pursuant to this constitutional mandate the Legislature, at an early date enacted provisions to insure the purity of elections, R. L., *c.* 41. Subsequently there was enacted "An act to prevent corrupt practices at elections, and to regulate expenditures for political purposes and provide for the publicity thereof. Laws, 1915, *c.* 169, which now appears in R. L., *c.* 42. This statute proceeded on the theory that an election was neither free nor equal if it was dishonest. Recent decisions of the Supreme Court of the United States indicate that the theory was valid and the objective constitutionally permissible, *United States* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649.

R. L., *c.* 42 entitled "Political Expenditures, Advertising and Contributions" places maximum limits on political expenditures, provides for publicity thereof, and prohibits other forms of "corrupt practices" in order to make elections free, equal and honest, *Coutremarsh* v. *Metcalf*, 87

N. H. 127, 131, 132. Section 9 of this chapter, prohibited any candidate or committee from paying newspapers any rate for political advertisements in excess of what was regularly charged by such newspaper "for commercial advertising occupying the same space and position and running the same length of time." Violation of this section was considered a corrupt practice under Section 16 of the same chapter. Laws, 1945 *c.* 185, *s.* 2, amended Section 9 by making it equally a corrupt practice for a newspaper to receive a rate "in excess of the rate or rates regularly charged • • • for commercial advertising • • • of similar character and classification. • • •"

In considering the constitutionality of R. L., *c.* 42, *s.* 9, as amended by Laws, 1945, *c.* 185, certain well established doctrines will be applied. First, "It has always been the practice in this jurisdiction to follow the universally accépted doctrine that the constitutionality of an act passed by the coordinate branch of the Government is to be presumed. It will not be declared invalid except on unescapable grounds." *Musgrove* v. *Parker*, 84 N. H. 550, 551. See also *Havens* v. *Attorney-General*, 91 N. H. 115, 121. Secondly, this Court is not to compete with the Legislature in matters of opinion "upon points of right, reason and expediency." *State* v. *Moore*, 91 N. H. 16, 21. Thirdly, "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that will sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *State* v. *Moore*, supra 22.

Counsel have not cited and research has not disclosed any case "on all fours." It is contended that the statute is arbitrary and lacks a rational basis in establishing the commercial advertising rate as a maximum rate for political advertising. In the absence of any case in point, we turn to laws elsewhere to determine if this statute is unique. A random selection indicates that the rates for political advertising in newspapers or by radio stations are limited by various methods and standards. Utah prohibits a political advertising rate which exceeds "the regular rate charged by newspapers." Utah Code Anno. (1943) 25: 13-27. Mississippi confines political advertising rates to the "usual

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and ordinary rate." Miss. Code Anno. (1942) *s.* 3176. Texas prohibits such rates in excess of "regular advertising rates." Vernon's Texas Statutes (1936) Penal Code Art. 211. North Dakota provides that "no newspapers in the state shall charge more than the legal rates for the publication of legal notices." N. D. Code (1943) 46-0505. Minnesota confines political advertising rates to "regular advertising rates," or requires a statement of the amount paid in dollars and cents. Minn. Statutes (1941) *ss.* 211.03, 211.05. The constitutionality of these statutes appear to have been unchallenged or assumed. *Engelbert* v. *Tuttle,* 185, Minn. 608.

The Statutes cited above prove that various states regulate political advertising and that the standard for a maximum or uniform rate is notd issimilar to that employed by our statute. "Laws expressly relating to political advertising have been found in more than four-fifths of the states. A survey of legislation in this category reveals that it is predominately regulatory in character." Roper, *State Advertising Legislation* (U. S. Dept. of Commerce, 1945) 14.

It is argued that the statute is discriminatory as applied to newspapers since it does not regulate political advertising by and in automotive equipment, aircraft and transportation systems, nor such advertising by job printers or billboard advertisers. It is sufficient answer to this argument that "the state is not bound to cover the whole field of possible abuses." *Welch Co.* v. *State,* 89 N. H. 428, 432. So far as we know the Legislature may have concluded that political advertising in aircraft and transportation systems and other similar mediums was not so extensive or presented the problems involved in newspaper and radio advertising. The proposition that the Legislature must regulate all or none is not accepted. We do not know the factual considerations upon which the Legislature made its determination but it is not to be assumed to be unreasonable if it can be supported on any reasonable basis. Merely because some political advertising might be done by a peripatetic popcorn vendor or some other transportation medium, human or mechanical, does not make the statute discriminatory.

Insofar as advertising by job printers and billboard advertisers is concerned, the Legislature may well have deter-

mined either that the regulation was not needed or the evils therein could not be regulated in the same manner as newspapers and radio stations. In short, the Legislature may regulate the major portion of any given problem within its police power without being required in so doing to control other minor and collateral evils connected therewith. "The Legislature is entitled to hit the evil that exists." *Queenside Hills Realty Co.* v. *Saxl*, 66 S. Ct. 850, 852, (April 22, 1946). So far as it is disclosed from the record or can be ascertained by judicial notice, the Legislature had a reasonable basis for including newspapers and radio stations and excluding other advertising media in its regulation of political advertising. Any contrary conclusion is entirely without support in this record. We cannot say that the statute is arbitrary, discriminatory or lacking a rational basis.

Plaintiff's right of freedom of contract is not unconstitutionally invaded by this legislation. *Commonwealth* v. *Boston Transcript Co.*, 249 Mass. 477, which held unconstitutional a statute compelling a newspaper to publish findings of the Minimum Wage Commission at regular rates, is clearly distinguishable. The present statute does not compel the plaintiff or any other newspaper to accept political advertising. It provides that if such advertising is accepted, the rate shall be the same as commercial rates. There is no special immunity to newspapers from the application of general laws. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103.

It cannot be successfully argued that freedom of the press is abridged. We do not have here a statute imposing a license tax on newspapers as in *Grosjean* v. *American Press Co.*, 297 U. S. 233. Neither does the statute suppress or censor newspapers as was attempted in *Near* v. *Minnesota*, 288 U. S. 697. The statute does not directly or indirectly exercise any previous restraint on the publication of news by newspapers. Freedom of the press is not an absolute right. *State* v. *Chaplinsky*, 91 N. H. 310, 317. *Giragi* v. *Moore*, 301 U. S. 670.

Concededly the plaintiff is not a public utility so that its rates may be regulated generally and therefore it cannot be compelled to accept political advertising. 87 A. L. R. 979.

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But it does not follow that because newspapers are not public utilities that they are immune from regulation. Newspapers, like other businesses, are subject to the police power. The view which once prevailed that a business is not subject to regulation unless affected with a public interest was considerably impaired in *Nebbia* v. *New York*, 291 U. S. 502 and was discarded in *Olsen* v. *State of Nebraska*, 313 U. S. 236. It is not necessary to consider the extent to which such regulation may go but so long as it does not involve suppression or censorship, the regulation of newspapers is as broad as that over other private business. *Associated Press* v. *United States*, 326 U. S. 1; Thayer, *Legal Control of the Press* (1944) Chap. 15.

The validity of the statute is attacked on the grounds that it does not set up an ascertainable standard of guilt. We conclude that the statute is as certain and definite as others heretofore upheld as constitutionally permissible. See, *United States* v. *Murzbach*, 280 U. S. 396, where the statute prohibited contributions for "any political purpose whatsoever." The statute is as definite as the words, "offensive," "derisive," and "annoying," which were involved in *State* v. *Chaplinsky*, 91 N. H. 310, affirmed 315 U. S. 568.

Although it is not necessary to support the conclusion in this case on historical grounds (cf. Attorney-General v. Morin, 93 N. H. 40), it may be noted that for more than a century the New Hampshire Legislature has regulated certain aspects of advertising. The Act of July 7, 1826, provided the amount of compensation that the New Hampshire Gazette was to receive for printing acts and journals of the Legislature in its paper. Laws of N. H., Vol. 10 *c.* 7. Laws, 1869, *c.* 1, *s.* 9, regulated advertising as follows: "If any advertising other than the laws of each session shall be ordered into any newspaper, the compensation therefor shall be the same as is usually paid by individuals for the same character and amount of matter in the same paper." Political advertising has been the subject of regulation for many years. Laws, 1911, *c.* 106; Laws 1915, *c.* 169.

It is concluded that the Legislature has the authority to regulate the abuse of political advertising as a corrupt prac-

tice. 69 A. L. R. 377; *Commonwealth* v. *Evans*, (Pa.) 40 A. (2d) 137, 139.

The plaintiff's rate for political advertising was in excess of any rate for any kind of commercial advertising and is prohibited by the statute. The plaintiff cannot avoid the statute by filing a higher political rate of three dollars per inch under a commercial rate of one dollar and a half or two dollars per inch. The plaintiff is subject to the provisions of Laws, 1945, *c.* 185.

Case discharged.

Marble, C. J., and Johnston, J., dissented: the others concurred.

Marble, C. J., dissenting: The legislative power to fix the rates which a business enterprise may charge is restricted to businesses clothed with a public interest or to commercial activities which concern the public health, safety, morals, or general welfare. See Cooley, Constitutional Limitations (7th *ed.*), 870-877; Black, Constitutional Law (3d *ed.*), 412-414; *Opinion of the Justices*, 88 N. H. 497-499.

The State cannot by mere legislative fiat convert a private business into a public utility (*Producers &c. Co.* v. *Commission*, 251 U. S. 228, 230, 231; 43 Am. Jur. 574), and it is generally held that the publication and sale of newspapers is a private enterprise not affected with a public interest. *Journal &c. Co.* v. *Company*, 286 Fed. 111, 113; *In re Wohl*, 50 Fed. (2d) 254, 257; *Shuck* v. *Herald*, 215 Iowa 1276, 1281; *Commonwealth* v. *Company*, 249 Mass. 477; *Philadelphia Record Co.* v. *Company*, 305 Pa. 372; *Mack* v. *Costello*, 32 S. D. 511. See, also, Snyder, "Freedom of the Press—Personal Liberty or Personal Property," 20 B. U. Law Rev. 1, 21.

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that

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policy by legislation adapted to its purpose." *Nebbia* v. *New York*, 291 U. S. 502, 523.

If, however, that legislation bears no substantial relation to a proper legislative purpose or is either arbitrary or discriminatory, it contravenes both the Fifth and the Fourteenth Amendments to the Federal Constitution as well as Articles 2 and 12 of our own Bill of Rights. *Opinion of the Justices*, 86 N. H. 597, 598; *Woolf* v. *Fuller*, 87 N. H. 64, 68; *State* v. *Paille*, 90 N. H. 347, 352; *State* v. *Moore*, 91 N. H. 16, 22; and cases cited.

Section 9, as originally enacted, was section 10 of chapter 169 of the Laws of 1915, entitled "An act to prevent corrupt practices at elections and to regulate expenditures for political purposes and provide for the publicity thereof." The section merely limited the sum which any candidate for public office might pay for newspaper advertising, but did not seek (as does Laws 1945, *c.* 185, *s.* 2) to limit the rates which a newspaper may charge.

A corrupt act is an act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive. Bouvier's Law Dictionary (Baldwin's Century *ed.*), *p.* 239. There is much which indicates that the real purpose of chapter 185 is to secure to candidates an economical means of advertising rather than to guard against the remote chance that a candidate may "bribe" a newspaper proprietor to reject all political advertising except his own. The doubt on this subject need not be resolved, however, for, even if it be conceded that chapter 185 bears some relation to the prevention of corrupt practices, the statute must be held invalid because of its arbitrary features.

Judicial notice may properly be taken of the fact that political advertising, though extensive, is temporary. Moreover, the statute affords no protection to publishers of political advertisements against liability for libelous statements contained therein (see *Commonwealth* v. *Company*, 249 Mass. 477, 482), and the editorial scrutiny of "copy" submitted by a candidate for office, in order to insure its freedom from defamatory matter, may entail more labor

than that required in the case of ordinary commercial advertisements.

The statute prescribes no method for determining whether the commercial rate it arbitrarily fixes as adequate for the service rendered political advertisers is reasonable. There is no presumption that it is. *Sharon Herald Co.* v. *County*, 132 Pa. Superior Ct. 245, 251. See *Commonwealth* v. *Company, supra.*

JOHNSTON, J., concurred in the foregoing opinion.